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IN THE

Supreme Court of The United States

October Term 1967

No. 1042

EDWARD LAMAR GAY,

Petitioner,

versus

CITY OF ORLANDO,

Respondent.

Petition for Writ of Certiorari to the
Supreme Court of the United States

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1967

No.

EDWARD LAMAR GAY,

Petitioner,

versus

CITY OF ORLANDO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Petitioner, EDWARD LAMAR GAY, respectfully prays for a Writ of Certiorari to the Supreme Court of the United States in order to review a mandate and judgment of the District Court of Appeal of the State of Florida, Fourth District, affirming the appellate decision of the Circuit Court of the Ninth Judicial Circuit which in turn affirmed the conviction by the Municipal Court of the City of Orlando of the charge of driving on a public highway while under the influence of intoxicating liquors and sentencing him to a fine of $200.00 or sixty (60) days in jail.

OPINIONS

The trial court issued no formal opinion. The Circuit Court of the Ninth Judicial Circuit of Orange County, sitting as an appellate court issued a brief opinion wherein they merely affirmed the conviction of the appellant by the municipal court of the City of Orlando. The District Court of Appeal, Fourth District entered a written opinion on September 22, 1967, wherein they affirmed the appellate decision of the Circuit Court, thereby denying the Petition for Writ of Certiorari. That opinion can be found in the Southern Reporters, Volume 202, at page 896.

JURISDICTION

The judgment and mandate of the District Court of Appeal, Fourth District, State of Florida, was entered on September 22, 1967. A timely petition for rehearing was filed on October 6, 1967, and was denied on the 26th day of October, 1967. (Appendix A & B respectively.)

The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED

Does the introduction into evidence of a person's refusal to take a physical test constitute a denial of the privilege against self-incrimination, especially where he has not been advised of his constitutional rights.

CONSTITUTIONAL PROVISIONS INVOLVED
FIFTH AMENDMENT

". . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty . . . without due process of law. . ."

STATEMENT OF THE CASE

(a) How Federal Question was Presented.

During the course of the trial in the municipal court the prosecution during direct examination attempted to introduce into evidence the refusal of the defendant to make any statement to the arresting police officer. Counsel for the defendant objected on the basis that the admissibility of his testimony would violate the defendant's constitutional rights (Tr. 18-19).

Again later on in the testimony when the other arresting officer was testifying on direct examination the prosecution attempted to get into evidence the refusal of the defendant to perform a physical test. A similar objection was made by defense counsel at this time (Tr. 68-69).

Petitioner's brief in the Circuit Court of Orange County for the Ninth Judicial Circuit, State of Florida, asserted that the introduction of evidence of the refusal of the defendant to make any statement or the refusal of the defendant to take a physical test was a violation of the petitioner's rights, not only under the

State Constitution, but in addition under the Fifth Amendment of the Federal Constitution.

On petition for rehearing before the Circuit Court, petitioner again raised the unconstitutionality of the admissibility of these statements against the defendant.

On the petition for writ of certiorari to the District Court of Appeal, Fourth District of Florida, petitioner again raised the question of admissibility of the refusal of the defendant to take the physical tests and to make any statements as being violative of the Fifth Amendment of the United States Constitution.

In the opinion rendered by the District court of Appeal, they found that evidence of the refusal of a defendant to take a breathalyzer test did violate the defendant's constitutional privilege against self-incrimination. However, they refused to extend this reasoning to the refusal to take a physical test or refusal to make any statement whatsoever.

Petitioner filed a petition for rehearing in the District Court of Appeal pointing out the incongruity of that court in finding that the refusal to take a breathalyzer test was violative of the defendant's constitutional privilege, whereas the refusal to take a physical test or refusal to make any statement was not violative.

The District Court of Appeal, State of Florida, Fourth District is the highest court in the State of Florida in

which a review of the conviction of the defendant may be had.

(b) Your petitioner was convicted on the 8th day of March, 1966, of violating City of Orlando Municipal Ordinance 39.113, to-wit: Driving while under the influence of intoxicating beverages. During the course of testimony the arresting police officers involved in this case were allowed to testify concerning defendant's refusal to take physical tests and to cooperate in the administration of any tests and refusal to make any statements to the officers.

The court admitted this testimony over objection of counsel, said objections being predicated upon the fact that the refusal to take such tests and refusal to make any statement is not admissible into evidence in that it violated defendant's right against self-incrimination guaranteed by the Florida Constitution Declaration of Rights, and the Fifth Amendment of the United States Constitution. The admission of testimony by the City was calculated to impress upon the trier of the fact that the defendant was afraid to take any tests for fear that it would prove him intoxicated or for fear that he would not be able to pass the tests.

This factor was brought out when the police officer was asked whether or not they advised the defendant of his constitutional rights, to which question the police officer replied, "I told him that if he didn't think he was drunk he didn't have to take the test." (Tr. 15)

The court overruled the objection of counsel and admitted the testimony on the basis that the refusal to take a test, even though the defendant had been improperly advised of his rights to silence was not a violation of his constitutional privilege against self-incrimination as guaranteed by the Declaration of Rights of the Constitution of the State of Florida, and the Fifth Amendment of the United States Constitution.

The only witnesses produced by the City of Orlando to testify as to the intoxication of the defendant were the two police officers.

REASONS FOR GRANTING THE WRIT

DOES THE INTRODUCTION INTO EVIDENCE OF A PERSON'S REFUSAL TO TAKE A PHYSICAL TEST OR REFUSAL TO MAKE ANY STATEMENT CONSTITUTE A DENIAL OF THE PRIVILEGE AGAINST SELF-INCRIMINATION?

It seems fallacious to hold as the District Court in Florida has that the refusal to take a breathalyzer test is not admissible into evidence because it does violate the defendant's constitutional right against self-incrimination, and yet the court refused to find that the refusal to make any statement or the refusal to take a physical test likewise should not be admitted into evidence on the basis of being violative of the Fifth Amendment and of the United States Constitution.

Gay v. City of Orlando, 202 So.2d 896

The law throughout the country is in a relative state of flux on the admissibility of a refusal of a defendant to make any statements. Generally, the weight of authority has been to disallow the refusal of a defendant to make any statement in evidence on the basis of it being violative of the State Constitution[1], others on basis of statutes[2], others on the basis of both State Constitutions and statutes[3] and some on just basic rules of evidence[4] but there has *not* been a clear enunciation as to what effect the Fifth Amendment of the United States Constitution has upon this principle.

This Supreme Court has indicated in a footnote in the case of *Schmerber v. State of California,* 86 S. Ct. 1826, that the placing into evidence of the defendant's refusal to submit to a breathalyzer test would require a reversal, [see case @ page 1833, footnote 9]. This court reasoned that if the prosecution wished to compel persons to submit to tests that it may have to forego the testimonial products obtained during the submission of the tests.

It is clear that the careful and meticulous reasoning of enlightened men would require that if a defendant is entitled to refuse to answer any questions propounded to him by law enforcement agency on the grounds that it might tend to incriminate him then

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[1]*State v. McCarthy,* 104 N.W.2d 673.
[2]*People v. Stratton,* 143 N.Y.S.2d 362, aff. 1 N.Y.2d 664.
[3]*State v. Severson,* 75 N.W. 2d 316.
[4]*State v. Munroe,* 171 A.2d 419; *People v. Knutson,* 149 N.E.2d 461; *Engler v. State,* 316 P.2d 625 and *People v. Brown,* 228 N.E.2d 505.

his exercising his constitutional right and his refusal to waive that right should not be introduced into evidence against him.

The opinion of the Fourth District Court of Appeal of Florida in this case appears well reasoned on this point along with the many decisions in other states which have similarly followed this line of reasoning[5].

It only remains for the Supreme Court of the United States to clearly enunciate the rule of law applicable to the Fifth Amendment of the Federal Constitution in order to completely place this matter at rest.

CONCLUSION

For reasons stated herein petitioner respectfully urges that his petition for writ of certiorari should be granted.

Dated: January 19 1968

Respectfully submitted,

DOMINICK J. SALFI

DOMINICK J. SALFI
Attorney for Petitioner

---

[5]*Duckworth v. State*, 309 P.2d 1103; *Saunders v. State*, 353 S.W. 2d 419; *State v. Clark*, 101 A.2d 868; *Gilley v. City of Anchorage*, 376 P.2d 484; *People v. Reeder*, 121 N.W.2d 840; *Hanlon v. Commissioner of Motor Vehicles*, 123 N.W.2d 136; *Cupp v. State*, 373 P.2d 260; *Stuart v. District of Columbia*, 157 A.2d 294.

CERTIFICATE

I, the undersigned member of the Bar of this Honorable Court, do hereby certify that copies of the above and foregoing Petition for Certiorari have been served upon opposing counsel, by depositing the same, postage prepaid, in the United States mail, at Orlando, Florida, this 18 day of January, 1968.

DOMINICK J. SALFI

APPENDIX A

Opinion and Judgment

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT
JULY TERM 1967

CASE NO. 1439

EDWARD LAMAR GAY,

Petitioner,

versus

THE CITY OF ORLANDO,
a municipal corporation,

Respondent.

Opinion filed September 22, 1967.

Petition for Writ of Certiorari to the Circuit Court for Orange County; W. A. Pattishall, Judge.

Dominick J. Salfi of Fishback Davis Dominick & Troutman, Orlando, for petitioner.

Joseph X. DuMond, Jr., Assistant City Attorney, Orlando, for respondent.

ANDREWS, Judge.

This case is here on a petition for a common law writ of certiorari. Petitioner asks us to review an appellate decision of the circuit court affirming his conviction in the municipal court of the City of Orlando.

Petitioner was arrested on a charge of driving while intoxicated and asked to take a breathalyzer test. He refused, and during the course of his trial the arresting officers testified as to his refusal. Counsel for petitioner objected to the introduction of this evidence and his objections were sustained. He argued, however, that this was insufficient because the judge was also the trier of facts and the damaging evidence had been heard. On appeal in the circuit court the judgment of conviction was affirmed without an opinion.

On amended motion for rehearing petitioner asserted that the appeal was improvidently lodged in the circuit court. He argued that the trial court's rulings on his objection, in effect, construed a controlling provision of the Florida or United States Constitution, to-wit, his privilege against self-incrimination. U.S. Const., amend. XIV & V; Fla. Const., Decl. of Rights § 12. This being so, appeal lay directly to the Supreme Court of Florida, Fla. Const., art. V, § 4(2), and petitioner urged that the appeal be transferred to the Supreme Court pursuant to F.A.R. 2.1(a)(5)(d).

The circuit court denied the amended motion for rehearing. Petitioner then filed his petition for cer-

tiorari contending two things: (1) that the circuit court was without jurisdiction to hear the appeal, and (2) that the circuit court's affirmance of the trial court ruling was incorrect and departed from the essential requirements of law.

Petitioner's first contention is without merit. Certiorari is the proper procedure to quash an appellate decision of a circuit court where the court has no jurisdiction. Robinson v. State, Fla. 1961, 132 So.2d 3. But in order to find that the circuit court was without jurisdiction, it must first appear that the trial court construed a controlling constitutional provision, thereby vesting exclusive appellate jurisdiction in the Supreme Court.

The Supreme Court has declared that, for direct appeal to lie, the trial judge must undertake to explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision. Page v. State, Fla. 1959, 113 So. 2d 557. This test has not been met here. The court in Page noted that application of facts in a case to a recognized clear-cut provision of a constitution does not amount to such an explanation or definition as will trigger the direct appeal provision. To invoke the right to a direct appeal it is necessary that the trial court do more than merely rule on a colorable assertion of constitutional rights. Roberts v. State, Fla. 1966, 181 So.2d 646. Were it otherwise, almost all criminal appeals would be to the Supreme Court. Many evidentiary rulings are made in the face of constitutional objections. Each ruling is made on a unique factual setting

and to that extent an existing doubt may be eliminated. But this is not sufficient. The Supreme Court has held that the mere fact that a constitutional right has been denied by a trial court, while error, does not give it jurisdiction. Actual construction or interpretation is required. Armstrong v. City of Tampa, Fla. 1958, 106 So.2d 407, 410.

In the instant case the trial court without elaboration applied constitutional standards to the facts before it. We conclude that the trial court did not construe a controlling constitutional provision. Consequently, the circuit court had jurisdiction to hear the appeal.

Petitioner's second contention presents an interesting problem. Petitioner was told he had a right not to take the breath analysis test. He chose not to and this fact was brought out at the trial. While it is true that the court sustained an objection to this testimony, petitioner nevertheless argues that the damage had been done and a mistrial should have been declared.

Petitioner's argument is that while a chemical test for intoxication is not violative of his privilege against self-incrimination, the state must forego any testimonial by-products which would fall within the privilege. Schmerber v. California, 1966, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908.

In Schmerber the United States Supreme Court held that the result of a blood test administered over the objections of a defendant was admissible in evidence and did not violate the defendant's self-incrimination

privilege. By analogy we hold that a properly administered breathalyzer test occupies the same status as the blood test in Schmerber. Evidence of petitioner's refusal to submit to the test, however, is a testimonial by-product that falls within the privilege.

In Schmerber the petitioner also refused a breathalyzer test and evidence of this was introduced. There the claim was that such evidence amounted to a comment on the invocation of the privilege and was inadmissible under Griffin v. California, 1965, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106, which held that a prosecutor could not comment on a defendant's failure to take the stand. The Schmerber court did not rule on this question, finding it to have been improperly presented. In a footnote, however, the court indicated that general Fifth Amendment principles would control rather than the precise holding of Griffin. Schmerber v. California, supra, n. 9.

This approach seems logical and supports our finding that results of a breathalyzer are not self-incriminating. The court appears to imply that because there is no privilege as to the breathalyzer, refusal to submit to the test is not an invocation of the privilege such as refusing to take the stand would be. It follows that comment or evidence of the refusal to take a breathalyzer or blood test does not fall within the rule in Griffin.

The admissibility of petitioner's refusal must be measured by general self-incrimination principles. It seems obvious that petitioner's statement was self-

incriminating and carried an inference of guilt. In fact it is difficult to see any relevancy in his statement other than providing such an inference. The Supreme Court noted that if an accused incriminates himself when faced with the prospect of taking a test, the testimony may be a product of compulsion and inadmissible. Schmerber v. California, supra, n. 9.

In the case before us petitioner was confronted with a choice of either voluntarily submitting to the test or refusing and thereby making a self-incriminating statement. While the results of a properly administered breathalyzer test are not within the privilege, self-incriminating testimonial by-products are. Schmerber v. California, supra.

Thus we agree with petitioner that evidence of his refusal to take a breathalyzer test is inadmissible. The trial court sustained his objections, however, and an examination of the record does not indicate that the substantial rights of the petitioner were so affected that a mistrial should have been declared. F.S.A. § 924.33.

The petition is denied.

COOPER, RICHARD H., Associate Judge, concurs.
CROSS, J., agrees to conclusion.

APPENDIX B

Order denying Petition for Rehearing

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT
JULY TERM 1967

EDWARD LAMAR GAY,
Petitioner,

versus Case No. 1439

THE CITY OF ORLANDO, etc.,
Respondent.

October 26, 1967.

ORDERED that petitioner's petition for rehearing, filed October 9, 1967, is hereby denied.

A TRUE COPY
JULIA MADDOX, CLERK
Stephanie M. Petrulak
By: Chief Deputy Clerk

cc: Dominick J. Salfi, Esq.
Joseph X. DuMond, Jr., Esq.

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IN THE

Supreme Court of The United States

October Term, 1967

No. 1042

EDWARD LAMAR GAY, *Petitioner*

vs.

CITY OF ORLANDO, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL FOR THE STATE OF FLORIDA FOURTH DISTRICT

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1967

No. 1042

EDWARD LAMAR GAY, *Petitioner*

vs.

CITY OF ORLANDO, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL FOR THE STATE OF FLORIDA FOURTH DISTRICT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS

The opinion of the District Court of Appeal for the State of Florida Fourth District is reported at 202 So2d 896.

JURISDICTION

The judgment and mandate of the District Court of Appeal, Fourth District, State of Florida, was entered on September 22, 1967. A timely petition for rehearing was filed on October 6, 1967, and was denied on the 26th day of October, 1967.

The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED

Does the introduction into evidence of a person's refusal to take a physical test constitute a denial of the privilege against self-incrimination, especially where he has not been advised of his constitutional rights.

CONSTITUTIONAL QUESTIONS INVOLVED
FIFTH AMENDMENT

". . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty . . . without due process of law . . ."

STATEMENT OF THE CASE

The Defendant, Edward Lamar Gay, appeared before the Municipal Court of the City of Orlando, Florida, on March 8, 1966, and entered a plea of not guilty to the charge of driving while intoxicated, (transcript of testimony, page 3).

Orlando Police Officer, Cletis J. Fort testified he was driving a patrol car when he observed the defendant automobile being driven in an unusual manner. He followed the defendant's automobile, and the defendant drove off the road twice, (transcript of testimony, page 8).

The police officer testified that he noticed an odor on the defendant's breath. That the defendant had a difficult time producing his drivers license, that he stumbled out of

his car, (transcript of testimony, pages 8-9), that he walked by holding onto the edge of the side of his car, (transcript of testimony, page 14), that his eyes were glazed and his speech was slurred, (transcript of testimony, page 20).

Orlando Police Officer Ralph B. Long testified he was with Police Officer Fort. Officer Long testified the defendant started to do certain tests, and he believed "he stopped". He testified the defendant's walk was "staggered", his speech slurred, that Officer Fort had to assist him in his walk and there was a slight struggle between the two. Further, he said the defendant "just about fell out" of his car "and appeared to be intoxicated", (transcript of testimony, pages 64-72).

During the trial the Municipal Judge sustained objections as to testimony of the defendant's refusal to take a breathalyzer test, (transcript of testimony, page 17). The Trial Judge also sustained objections as to questions relating to any other type of test except physical tests, (transcript of testimony, page 15).

The defendant was requested to perform a physical test by the arresting officer, and did perform such test. The following testimony of the arresting police officer, Cletis J. Fort, is contained on pages 11 and 12 of the transcript of testimony:

BY MR. PERKINS:

Q. Tell the Court exactly what happened at the time and place regarding the physical tests with the defendant?

A. I asked the defendant to watch me, because I wanted to give him a physical test for drunkenness. I explained and showed him what I wanted him to do.

Q. What did you tell him that you wanted him to do; tell the Court?

A. I told him to put his heels together, tilt his head back, put his arms out to his side; but he never reached that point.

Q. Did you demonstrate to him what you wanted done?

A. I did.

Q. Tell the Court and show the Court exactly how he reacted to that performance.

A. When I asked him to put his heels together he did that, and I told him to tilt his head back and he did that and then he lost his balance.

The arresting officer testified as to the refusal of the defendant to make a statement when explaining that the defendant was not cooperative. This testimony is contained on pages 18 and 19 of the transcript of testimony:

BY MR. PERKINS:

Q. Now, what happened at the time after you give the defendant the physical test that you have testified to; then what did you do with the defendant?

A. Took hold of his arm and took him to the car.

Q. What manner did you have to take him to the car?

A. I would say hold him enough so that he didn't turn around.

Q. Now, was the defendant cooperative?

A. No, sir.

Q. Tell the Court what he said and what he did in not being cooperative?

A. He said he wasn't going to tell me anything.

MR. SALFI: Your Honor, I object; this is totally improper. It is not responsive to the question; I cannot object to testimony like this.

THE COURT: I don't think there is anything objectionable about that: He said he wasn't going to tell him anything."

The defendant appealed the adjudication of guilty to the Circuit Court of the Ninth Judicial Circuit, as this was the Court with Appellate jurisdiction under Florida Law, (Florida Statute 932.52). The conviction of the Trial Judge was affirmed without opinion on January 19, 1967, (transcript of record, p 119).

Defendant then filed a petition for Writ of Certiorari in the District Court of Appeal, Fourth District, State of Florida, stating the following "Points Involved on Certiorari".

POINT I

DOES THE CIRCUIT COURT HAVE APPELLATE JURISDICTION WHERE A TRIAL COURT CONSTRUES A PROVISION OF THE FLORIDA OR FEDERAL CONSTITUTION?

POINT II

IS THE CIRCUIT COURT WHEN SITTING AS AN APPELLATE COURT REQUIRED TO TRANSFER AN APPEAL TO THE PROPER COURT WHEN IT DOES NOT HAVE JURISDICTION?

POINT III

DID THE TRIAL COURT IN THE INSTANT CASE CONSTRUE A CONTROLLING PROVISION OF THE FLORIDA OR FEDERAL CONSTITUTION?

The District Court of Appeal in an opinion dated September 22, 1967, denied the petition for writ of certiorari holding that although the Florida Constitution provided for district appeals to the Supreme Court of Florida in cases where the trial court rules on a controlling provision of the Florida or United States Constitution, (Fla. Const., Art. V, § 4(2). The Supreme Court of Florida had interpreted this provision of the Florida Constitution to mean that the trial court must make an actual construction or interpretation of a State or Federal Constitutional provision.

The District Court further said in the last paragraph of its opinion the following:

> "Thus we agree with petitioner that evidence of his refusal to take a breathalyzer test is inadmissible. The trial court sustained his objections, however, and an examination of the record does not indicate that the substantial rights of the petitioner were so affected that a mistrial should have been declared. F.S.A. § 924.33.
>
> The petition is denied."

ARGUMENT

The Defendant did not refuse to take all physical tests, but as pointed out in Respondent's summary, voluntarily took a balancing test and lost his balance. The testimony appears to be concerned with one physical test, described as a balancing test, or a finger to nose test. Defendant's objection to testimony in regard to his refusal to take a "breathalyzer" test were sustained. There does not appear to be a testimonial by-product of a refusal to take any test, physical or chemical, that was considered by the Court. Further, if a defendant takes one physical test, and then refused to take another, the simple explanation of a police officer that the defendant refused to cooperate further would hardly be a "testimonial by-product".

It is the Respondent's position that the police officer did not have to advise the defendant of his privilege of self-incrimination prior to requesting him to take either a physical or chemical test under the authority of *Schmerber* v. *California*, 1966, 384 U.S. 757, 86 S Ct 1826, 16 L Ed 2d 908.

The defendant's silence or refusal to cooperate with the arresting officer afforded no fair ground for a relevant influence of his guilt, and therefore is not a ground for granting this petition. In the instant case the Court clearly indicated that he did not consider any silence or refusal to cooperate as an inference of guilt, (transcript of testimony, pages 69-70). In this connection, it should be noted that the case was tried without a jury. It is therefore, obvious

that the matters cited by the defendant in his petition to this Court constitute a most, harmless error, Title 28, United States Code, § 2111 provides:

"§ 2111. Harmless error.

On the hearing of any appeal or writ of certiorari in any case, the Court shall give judgment after examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

In connection with the admission of evidence of a defendant's silence in face of questioning upon arrest, it is of interest to note two fairly recent cases decided by the United States Court of Appeals, Second Circuit.

In the first case, *U.S.* v. *Piccioli*, 352 F2d 856, testimony was submitted to the Court that a Special Agent shortly after a raid told the defendant that he would like to ask "a few personal history questions". Defendant's attorney happened to be present, and informed the officer that he had instructed the defendant not to answer any questions. Although defendant's counsel made no objection at the time, the trial judge, over the objection of defendant's counsel, elicited an affirmative answer from the special agent to the question, "But the defendant was instructed in your presence - - - not to answer any questions with respect to whether he was accepting horse wagers on the premises."

The Court of Appeals held the question by the trial judge was ill-advised and was not cured by the judge's sub-

sequent instruction to the jury that the attorney and the defendant had been acting within their rights, but was not ground for reversal.

• In the other case, *United States* v. *Mullings*, 364 F2d 173, the United States Court of Appeals, Second Circuit, reversed a conviction for theft. The United States Court of Appeals said, "the trial judge should not have given any weight whatever to the fact that, when Mullings was arrested, - - - Mullings "did not state he was in the terminal looking for someone," (this being the defendant's explanation of his presence on the scene, where he was accused of being a lookout).

In the case before the Court, if any testimony in the record as evidence of the defendant's silence, it is obvious that the Municipal Judge gave no weight to such testimony as reflected by the record. There was overwhelming evidence of defendant's guilt as reflected by the testimony of two police officers. Where the error committed in the admission of testimony is harmless, Certiorari should be denied.

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1. *U.S.* v. *McMaster*, C A Mich 1965, 345 F 2d 176, Certiorari denied 86 S Ct 42, 43, 382 U.S. 818 15 L Ed 2d 65, rehearing denied, 86 S Ct 529, 3 82 U S 1000, 15 L Ed 2d 486 (2 mems)

   Ahlstedt v. U.S. C.A. Fla 1963, 315 F 2d 62

CONCLUSION

For the reasons stated herein respondent respectfully urges that this petition for writ of certiorari should be denied.

Dated February _____, 1968.

NORMAN BURKE
Attorney for Respondent

CERTIFICATE

I, the undersigned member of the Bar of this Honorable court, do hereby certify that copies of the above and foregoing brief in opposition to Petition for Writ of Certiorari have been served upon opposing counsel by depositing the same, postage prepaid in the United States mail, at Orlando, Florida, this _____ day of February, 1968.

_____

NORMAN BURKE